JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

16 November 2006 *

In Case T-333/03,

Masdar (UK) Ltd, established in Eversley (United Kingdom), represented by A. Bentley QC, and P. Green, Barrister,

applicant,

v

Commission of the European Communities, represented by J. Enegren and M. Wilderspin, acting as Agents,

defendant,

ACTION under Article 235 EC and the second paragraph of Article 288 EC for payment for services supplied by the applicant in connection with TACIS contracts MO.94.01/01.01/B002 and RU 96/5276/00, compensation for the damage suffered by the applicant as a result of the non-payment for those services and payment of interest,

* Language of the case: English.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of M. Vilaras, President, E. Martins Ribeiro and K. Jürimäe, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 6 October 2005,

gives the following

Judgment

Relevant provisions

1 Article 28(2) of the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities (OJ 1977 L 356, p. 1; 'the Financial Regulation'), in the version in force on 4 April 2000, provides:

'The competent authorising officer shall draw up, in respect of every debt identified as being a tangible and valid obligation to pay, a proposal that the debt be established and a recovery order ...'

Facts

2 At the beginning of 1994, under the Community programme of Technical Aid to the Commonwealth of Independent States (TACIS), contract MO.94.01/01.01/B002 was signed between the Commission, represented by the Deputy Director-General of Directorate-General (DG) for External Economic Relations, and Helmico SA, represented by its managing director. That contract ('the Moldova contract') was entitled 'Assistance to Organisation of a Private Farmers' Association' under the project reference TACIS/FD MOL 9401 ('the Moldova project').

3 In April 1996 Helmico and the applicant entered into an agreement whereby Helmico sub-contracted to the applicant the provision of some of the services provided for under the Moldova contract.

4 On 27 September 1996 TACIS contract RU 96-5276-00 was signed between the Commission, represented by the Deputy Director-General of DG External Relations, and Helmico, represented by its managing director. By virtue of that contract ('the Russian contract') Helmico undertook to provide services in Russia for a project entitled 'Federal Seed Certification and Testing System' with project number FD RUS 9502 ('the Russian project').

5 In December 1996 Helmico and the applicant entered into a subcontract for the Russian project in substantially the same form as the agreement signed in April 1996 in relation to the Moldova project.

6 Towards the end of 1997 the applicant began to be concerned about the fact that payments from Helmico were late. The excuse proffered by Helmico was that the

delay was on the side of the Commission. The applicant contacted the Commission's services and discovered that they had paid all Helmico's invoices up to that date. Upon further investigation the applicant discovered that Helmico had been informing it late or incorrectly of the payments received from the Commission. In particular, it turned out that Helmico had informed the applicant of the receipt of funds from the Commission up to nine months after the event, claiming that underpayments had been received from the Commission when in fact full payment had been received, that payments from the Commission were still being processed when in fact they had been made, and submitting to the applicant copies of invoices sent to the Commission which did not reflect the amounts billed by the applicant to Helmico.

7 On 2 October 1998 a meeting took place between a director of Masdar and representatives of the Commission.

8 On 5 October 1998 the Commission sent a letter by fax to Helmico. In that letter, the Commission stated that it was concerned about the fact that differences of opinion among the members of the Helmico consortium could endanger the implementation of the Russian project and stated that adherence to the terms of the Russian contract and the successful completion of the Russian project were of great concern to it. It requested from Helmico an assurance in the form of a declaration signed jointly by Helmico and the applicant that the two parties were in complete agreement about adherence to the terms of the Russian contract and that the Russian project would be completed within the time-limits set. The letter stated that, failing receipt of such an assurance by Monday 12 October 1998, the Commission would explore alternative means for safeguarding the completion of the project according to the terms of the Russian contract.

9 By fax of 6 October 1998, Helmico replied to the Commission's services stating that differences of opinion between consortium members had been settled and that the successful completion of the Russian project was in no danger whatsoever. That

reply stated that the consortium members had agreed that all future payments, including those of invoices currently being processed in respect of the Russian project, should be made to a named bank account of the applicant and not to Helmico's bank account. It also stated as follows:

'It has also been agreed that contract management should be transferred to Mr S, Chairman of Masdar, as of today. Could you please come back to us as soon as possible, confirming your acceptance of these amendments.'

10 That letter was signed by Mr T as managing director of Helmico and endorsed in manuscript: 'Agreed Mr S, Masdar, 6 October 1998'.

11 A letter written in similar terms bearing the same date and countersigned by the chairman of Masdar was sent by Helmico to the Commission in relation to amounts payable in respect of the Moldova contract.

12 On 7 October 1998 Helmico sent the Commission two further letters, signed by Mr T and countersigned by Mr S on behalf of Masdar. Their tenor was the same as those of 6 October, except that the letter concerning the Russian contract did not mention any bank account, while the letter concerning the Moldova contract mentioned the number of a bank account of Helmico in Athens for future payments.

13 On 8 October 1998 Helmico wrote two letters to the corresponding task managers in the Contracts department of the Commission requesting that all future payments under the Russian contract and the Moldova contract be made to a different account in Helmico's name in Athens. Those letters ended with the following statement:

'This instruction is irrevocable by Helmico without written approval from the chairman of Masdar, Mr S. We would be grateful if you could inform Masdar of payment status, and when payments are made.'

14 On 8 October 1998 Helmico and the applicant signed an agreement giving Masdar's chairman power of attorney to transfer funds from the two accounts mentioned in the letters of 7 and 8 October addressed to the Commission.

15 On 10 November 1998 the Commission issued its end-of-project report in respect of the Russian project. Of the six heads of assessment, four were assessed 'excellent', one 'good' and one 'generally adequate'. On 26 February 1999 the Commission issued its end-of-project report on the Moldova project, for which two heads of assessment were 'good' and four were 'generally adequate'.

16 In February 1999 Commission officials undertook an audit of the Moldova project and the Russian project. The audit of the Russian project was completed in April 1999. The audit of the Moldova project had not been completed by July 1999.

17 On 29 July 1999 the Commission sent a letter to the applicant in which it stated that the Commission had been notified of the existence of financial irregularities between Helmico and the applicant during the performance of the Russian contract and the Moldova contract and had consequently suspended all payments which had not yet been made; it had initiated a full audit in order to determine whether Community funds had been misappropriated under the Russian contract and the Moldova contract. Being conscious of the applicant's financial difficulties, the Commission informed the applicant that it proposed to pay EUR 200 000 to the account of Helmico referred to in that company's instructions dated 8 October 1998.

18 The sum of EUR 200 000 was paid in August 1999 to that account and was then transferred to the account of the applicant.

19 From December 1999 to March 2000 the chairman of Masdar wrote to various Commission officials, including the Member of the Commission responsible for External Relations, Mr Patten. Among several points raised was the question of payment for the services provided by Masdar.

20 On 22 March 2000 the Director-General of the Common Service for External Relations of the Commission wrote to the chairman of Masdar saying:

'After intensive consultation (in which we considered several options, including a final settlement of both contracts by means of additional payments in favour of Masdar, calculated on the basis of work done and expenditure incurred by you), it has been finally decided by the Commission services to proceed with recovery of the funds previously paid to the contractor, Helmico. Legally, it seems that any direct payments to Masdar (even through Helmico's bank account over which you have

power of attorney) would be seen, in case of insolvency of Helmico, as a collusive action by Helmico trustees or creditors; it would be furthermore uncertain whether in a legal dispute between Helmico and Masdar, funds paid by the European Commission could definitely remain with Masdar, in accordance with the Commission's best intentions.'

21 On 23 March 2000 the Commission wrote to Helmico informing it that it declined to pay the outstanding invoices and requesting the return of funds totalling EUR 2 091 168.07. The Commission took that course of action having discovered that Helmico had been guilty of fraud in the performance of the Moldova contract and the Russian contract.

22 On 31 March 2000 the applicant brought an action against Helmico before the High Court of Justice of England and Wales, Queen's Bench Division, by which it claimed payment for the services sub-contracted under the Moldova contract and the Russian contract totalling EUR 453 000.

23 On 4 April 2000 the Commission issued two formal recovery orders to the attention of Helmico pursuant to Article 28(2) of the Financial Regulation. The details of those documents were communicated to the applicant's lawyers on 1 February 2002 (see paragraph 36 below).

24 On 15 June 2000 the chairman of Masdar sent a fax to the Member of the Commission responsible for External Relations in which he stated:

'18 months ago we alerted the European Commission to the problems which we were having with our partners Helmico on the above two projects. We were given

assurances that if we continued with the projects the European Commission would ensure we were paid for our services. We continued to fund and implement the two projects on your behalf at considerable incremental cost despite the fact that we already realised that Helmico had defrauded Masdar and that these funds would probably be unrecoverable.'

25 The reply of the Member of the Commission by letter of 25 July 2000 confirms the position of the Commission expressed in the letter of 22 March 2000.

26 On 5 February 2001 the chairman of Masdar sent another fax to the Member of the Commission responsible for External Relations arguing that the applicant was party to the Russian contract and the Moldova contract concluded with the Commission, and that at the meeting of 2 October 1998 it had been given an assurance that it would be paid if it continued with the Russian project and the Moldova project.

27 In April 2001 the applicant contacted the Commission in order to discuss the possibility of the Commission paying Masdar directly for the work it had done and invoiced to Helmico.

28 By letter of 8 May 2001 the Member of the Commission responsible for External Relations repeated the Commission's view that the applicant was not party to the Russian contract and the Moldova contract.

29 On 21 May 2001 the applicant's lawyers had a meeting with the Commission's services to discuss the possibility of payment being made to the applicant directly for the services it had provided.

30 On 1 August 2001 the applicant's lawyers repeated the request for an ex-gratia payment from the Commission. The applicant asked for payment of EUR 448 947.78 or, in the alternative, EUR 249 314. The first figure corresponded to the total invoiced by Helmico to the Commission which remained unpaid, and the second corresponded to the sum in respect of work done after the discovery of the fraud.

31 On 28 August 2001 a meeting took place between the applicant's lawyers and the Commission's services to discuss the possibility of payment being made to the applicant directly for the services it had provided.

32 On 10 October 2001 the applicant's lawyers sent the Commission a copy of a report prepared in 1998. It was suggested that that report might assist the Commission's services in tracing the directors of Helmico.

33 On 16 October 2001 the Commission replied, stating that the information had been forwarded to the competent services in DG Budget, to the European Anti-Fraud Office and to the financial and contractual unit dealing with TACIS programmes, and that the Commission would take all steps to pursue the directors of Helmico.

34 On 16 October 2001 the applicant's lawyers wrote to the Commission claiming that there was a tacit agreement between the Commission and the applicant that, as from 8 October 1998, the Commission would pay the applicant provided the latter took steps to ensure that the Russian project and the Moldova project were completed. The main arguments advanced in that letter sought to demonstrate that the

Commission had accepted that in 1998 the applicant had become the lead contractor of the Russian project. That letter ends with the following statement:

'I would be grateful if you could let me know whether Commission services accept the argument set out in this letter, and if so, whether they are prepared to make an interim payment to Masdar Ltd of EUR 279 711.85 pending completion of the recovery proceedings against Helmico.'

35 The arguments put forward by the applicant's lawyers were rejected by letter of the Commission dated 13 November 2001. The letter ended with the following statement:

'The Commission will proceed to recover the funds received by Helmico from Helmico's representatives on the basis of the recovery order. Depending on the outcome of the recovery, further steps with regard to the use of the amount recovered, if any, may be considered.'

36 On 1 February 2002 in a written reply to a request from the applicant's lawyers, the Commission explained that two formal recovery orders had been issued on 4 April 2000 to the attention of Helmico, one with respect to the Moldova contract for an amount of EUR 1 236 200.91 and the second with respect to the Russian contract for an amount of EUR 854 967.16, being a total of EUR 2 091 168.07.

37 In a letter of 27 February 2002 addressed to the Commission, the applicant's lawyers observed that the amounts in the two formal recovery orders corresponded more or less to the amounts listed as having been paid by the Commission to Helmico. They

suggested that the Commission did not therefore consider it necessary to issue recovery orders for the amounts billed by Helmico to the Commission but not paid by the latter.

38 On 11 March 2002 the Commission wrote to the applicant's lawyers confirming that the two formal recovery orders issued by the Commission on 4 April 2000 to the attention of Helmico did not cover the amounts billed by Helmico to the Commission but not paid by the latter.

39 On 17 December 2002 the Legal Service of the Commission sent to the applicant's lawyers a schedule of the amounts invoiced by Helmico to the Commission, the dates and amounts of payment and the amounts of payments not made.

40 On 18 February 2003 a meeting was held between the applicant's lawyers and the Commission's services.

41 On 23 April 2003 the applicant's lawyers wrote to the Commission by registered letter which ends with the following statement:

'... unless the Commission services are able to come forward, by 15 May 2003, with a concrete proposal for remunerating my client for the services provided, an application will be made to the Court of First Instance seeking reparation from the Commission pursuant to Articles 235 EC and 288 EC (formerly Articles 178 and 215 of the EC Treaty).'

42 By fax dated 15 May 2003 the Commission wrote to the applicant's lawyers suggesting that a meeting should be held to discuss a possible amicable settlement on the basis of which the Commission would pay the applicant EUR 249 314.35 for the work done after discovery of Helmico's fraud, on condition that the applicant provide evidence of an agreement that it would be paid directly by the Commission if it completed the Russian project and the Moldova project.

43 By registered letter of 23 June 2003 the applicant's lawyers replied to the Commission rejecting the Commission's suggestion as a basis for further negotiations, setting out details of the applicant's claim and the terms and conditions on which it would agree to a meeting.

44 That registered letter was followed by a fax dated 3 July 2003 in which the applicant's lawyers requested a reply from the Commission on the possibility of setting up a meeting, before 15 July 2003, on the terms proposed, stating that if such a meeting were not possible an application would be made to the Court of First Instance.

45 By letter dated 22 July 2003 the Commission replied that it did not see any possibility of satisfying the applicant's requests for payment.

Procedure

46 By application lodged at the Registry of the Court of First Instance on 30 September 2003, the applicant brought the present action.

47 The written procedure was closed on 22 April 2004.

48 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure and, as measures of organisation of procedure laid down in Article 64 of the Rules of Procedure of the Court of First Instance, invited the parties to produce certain documents and reply to certain written questions before the hearing. The parties complied with those requests within the prescribed period.

49 On 6 October 2005 an informal meeting was held before the Fifth Chamber of the Court of First Instance as a measure of organisation of procedure, to explore the possibility of an amicable settlement to the case.

50 The oral arguments of the parties and their replies to the Court's questions were heard at the hearing on 6 October 2005.

51 At the end of the hearing the Court granted the parties a period which expired on 30 November 2005 for the purpose of exploring the possibility of an amicable settlement to the case. The President of the Fifth Chamber then decided to stay the close of the oral procedure.

52 By letter lodged at the Registry of the Court of First Instance on 23 November 2005, the applicant informed the Court that at that time the parties had still not reached an amicable arrangement.

53 By the same letter the applicant withdrew some of its claims for compensation, amending the form of order sought as a consequence. In particular it abandoned the claim, wholly or in part, for compensation for certain heads of consequential loss totalling GBP 1 402 179.95, apart from any sum which might be granted for moral damage.

54 By letter lodged at the Registry of the Court of First Instance on 29 November 2005, the Commission informed the Court that it had not been possible for the parties to reach a friendly settlement in the case.

55 On 6 January 2006, the Commission submitted its observations on the applicant's partial withdrawal of its compensation claims. It stated, inter alia, that it was continuing to request that the application be dismissed and that the applicant be ordered to pay the costs. The Commission contended in the alternative that, should the applicant succeed wholly or partly in the action, it should nevertheless bear at least one third of its own costs.

56 The President of the Fifth Chamber closed the oral procedure on 16 January 2006. The parties were informed thereof by letter of 18 January 2006.

Forms of order sought

57 The applicant claims that the Court should:

— order the Commission to pay to the applicant:

— the sum of EUR 448 947.78;

— interest on that sum as at 31 July 2003 in the amount of GBP 98 121.24, plus interest from 1 August 2003 until the date of judgment;

— as compensation for consequential loss, the following sums:

— the sum of GBP 34 751.14 for legal fees;

— the sum of GBP 87 000 for the loss arising out of the need to sell some of its immovable property at an inopportune time;

— such sum as the Court thinks fit for moral damage;

— order the Commission to pay the costs of the present proceedings.

58 The Commission contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs;

— in the alternative, should the applicant succeed wholly or partly in its action, order the applicant to bear at least one third of its own costs.

Law

Introductory observations of the Court

59 It should be recalled at the outset that, in accordance with settled case-law, in order for the Community to incur non-contractual liability under the second paragraph of Article 288 EC for the unlawful conduct of its institutions a number of conditions must be satisfied: the conduct of the institutions must be unlawful, actual damage must have been suffered and there must be a causal link between that conduct and the damage pleaded (Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16; Case T-175/94 *International Procurement Services* v *Commission* [1996] ECR II-729, paragraph 44; and Case T-267/94 *Oleifici Italiani* v *Commission* [1997] ECR II-1239, paragraph 20)

60 If any one of those conditions is not satisfied, the action must be dismissed in its entirety and it is unnecessary to consider the other conditions (Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraphs 19 and 81; Case T-170/00 *Förde-Reederei* v *Council and Commission* [2002] ECR II-515, paragraph 37; and Case T-273/01 *Innova Privat-Akademie* v *Commission* [2003] ECR II-1093, paragraph 23).

61 In order to satisfy the condition relating to the unlawfulness of the alleged conduct of the institution, case-law requires that there must be established a sufficiently serious breach of a rule of law intended to confer rights on individuals (Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 42).

62 As regards the requirement that the breach must be sufficiently serious, the decisive test for finding that it is satisfied is whether the Community institution concerned has manifestly and gravely disregarded the limits on its discretion. Where that institution has only a considerably reduced or even no discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (Case C-312/00 P *Commission* v *Camar and Tico* [2002] ECR I-11355, paragraph 54, and Joined Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99 *Comafrica and Dole Fresh Fruit* v *Commission* [2001] ECR II-1975, paragraph 134).

63 It should be added that the second paragraph of Article 288 EC bases the obligation which it imposes on the Community to make good any damage caused by its institutions on 'the general principles common to the laws of the Member States' and therefore does not restrict the ambit of those principles solely to the rules governing the non-contractual liability of the Community for the unlawful conduct of those institutions.

64 National laws on non-contractual liability enable individuals, albeit in varying degrees, in specific fields and in accordance with differing rules, to obtain compensation in legal proceedings for certain kinds of damage, even in the absence of unlawful action on the part of the perpetrator of the damage.

65 When damage is caused by conduct of the Community institutions not shown to be unlawful, the Community can incur non-contractual liability if the conditions

relating to actual damage, the causal link between that damage and the conduct of the Community institutions, and the unusual and special nature of the damage in question are all met (see, to that effect, Case C-237/98 P *Dorsch Consult* v *Council and Commission* [2000] ECR I-4549, paragraph 19).

66 As regards those two terms, damage is 'unusual' when it exceeds the limits of the economic risks inherent in operating in the sector concerned, and 'special' when it affects a particular class of economic operators in a disproportionate manner by comparison with other operators (*Förde-Reederei* v *Council and Commission*, paragraph 56, and Joined Cases T-64/01 and T-65/01 *Afrikanische Frucht-Compagnie and Internationale Fruchtimport Gesellschaft Weichert* v *Council and Commission* [2004] ECR II-521, paragraph 151).

67 It is in the light of those observations that the applicant's claim for compensation must be examined.

68 The applicant claims that its action is well founded since the Commission infringed principles of non-contractual liability recognised in many of the Member States. It refers in that regard to the following actions:

— the civil law action based on the principle of the prohibition of unjust enrichment (*de in rem verso*);

— the civil law action based on *negotiorum gestio*;

— the action based on breach of the Community law principle of the protection of legitimate expectations;

— the civil law action based on the fact that the acts of the Commission constitute fault (*faute*) or negligence which has caused loss.

69 The Court of First Instance notes that the applicant's claim for compensation is based, first, on rules on non-contractual liability which do not entail unlawful conduct on the part of the Community institutions or its agents in carrying out their task (unjust enrichment and *negotiorum gestio*) and, secondly, on the body of rules on the non-contractual liability of the Community for the unlawful conduct of its institutions and agents in carrying out their task (breach of the principle of the protection of legitimate expectations and fault or negligence of the Commission).

The claims based on the non-contractual liability of the Community in the absence of unlawful conduct on the part of its institutions (actions de in rem verso *and* negotiorum gestio*)*

Arguments of the parties

70 To found a *de in rem verso* civil action, the applicant claims that, according to the principles of law common to the Member States, four conditions must be satisfied:

— the defendant has been enriched;

— the claimant has been impoverished;

— there is a link between the enrichment of the defendant and the impoverishment of the claimant;

— neither the enrichment nor the impoverishment has a valid legal basis. In other words, the enrichment is unjust or without 'cause'.

71 So far as concerns the first condition, the applicant submits that the Commission has been enriched to the total value of the services covered by the invoices in respect of which payment was suspended, namely EUR 448 947.78.

72 With regard to the second condition, the applicant submits that, since the invoices in respect of which the Commission suspended payment correspond to services provided by the applicant or sub-contracted to third parties and paid for by the applicant, that suspension caused it to be impoverished by the same amounts. It was not possible to recover the amounts from Helmico, which raised the suspension of payment and the issue of the recovery orders by the Commission as a defence to the action brought by the applicant in the United Kingdom. The applicant adds that the apparent bankruptcy of Helmico and the disappearance of its directors rendered the applicant's impoverishment definitive.

73 In respect of the third condition, the applicant submits that it follows from the foregoing that there is a direct link between the amount by which the Commission has been enriched and the amount by which the applicant has been impoverished.

74 As regards the fourth condition, the applicant submits that the Financial Regulation does not constitute a justification for the Commission's refusal to make the payments for the work carried out after the discovery of the fraud in October 1998, since the regularity of the subsequent invoices is not called in question. The Commission was thus able, with full knowledge of the facts, to have the benefit of the services provided by the applicant without ever paying for them by using its powers of suspension and recovery when the applicant had completed performance of its obligations and payment was the only contractual obligation which remained to be performed. The Commission was thus enriched unjustly and without cause.

75 The applicant also relies on the general principle of Community law that the Community should not be unjustly enriched to the detriment of third parties.

76 As regards the civil law action based on *negotiorum gestio*, the applicant claims that to found such an action according to the principles of law common to the Member States the following five conditions must be satisfied:

— the management of the principal's affairs, whether legal or material, must benefit the principal;

— at the relevant time the principal was unable to manage his own affairs, but there was a need for his affairs to be managed;

— the manager had no intention to act gratuitously — there was no *animus donandi*;

— the manager was under no contractual obligation to manage the affairs of the principal;

— the principal could reasonably have been expected to take the action undertaken by the manager had the principal been aware of the need for action.

77 The first condition is satisfied because the Commission issued favourable end-of-project reports and thus accepted the work done by the applicant.

78 The second condition is satisfied because, as is evident from the fax of 5 October 1998, the Commission was concerned that the Russian contract and the Moldova contract would not be completed and therefore asked the applicant to take steps to ensure that they would be completed.

79 The third condition is satisfied because the fact that the applicant raised concerns about non-payment in October 1998 demonstrates that it had no intention of providing the services gratuitously. That is corroborated by the fact that it arranged with Helmico to set up a special account over which the applicant had power of attorney so that all payments by the Commission to this account could be transferred to the applicant.

80 The fourth condition is satisfied because the Commission's services themselves deny that there is any contractual relationship between the Commission and the applicant.

81 The fifth condition is satisfied because the Commission's services wrote in their fax of 5 October 1998:

'Failing receipt of such an assurance by close of business, Monday, 12 October, the Commission would explore alternative means for safeguarding the completion of the project according to the terms of the contract.'

82 In the applicant's view, the consequences of the existence of *negotiorum gestio* are that the manager must continue the management of the principal's affairs until the principal is able to look after them himself and act reasonably, *en bon père de famille*. The principal must indemnify the manager for the services provided and the costs incurred as a result of such management. In the present case, since the applicant completed the Russian project and Moldova project and acted reasonably, it is therefore entitled to reasonable remuneration for the work done plus reimbursement of all costs incurred in carrying out such work.

83 The applicant submits that the application of those general principles of non-contractual liability common to the Member States is not subject to a condition relating to the unlawful conduct of the enriched party or the principal. The unlawful act arises when and if the enriched party refuses to reimburse the impoverished party (action *de in rem verso*) or the principal refuses to indemnify the manager (*negotiorum gestio*). The applicant therefore concludes that all of its claims are founded.

84 The Commission refers to case-law to the effect that in order for the Community to incur non-contractual liability the applicant must prove the unlawfulness of the alleged conduct of the Community institution concerned, actual damage and the existence of a causal link between that conduct and the alleged damage (Case T-113/96 *Dubois et Fils* v *Council and Commission* [1998] ECR II-125, paragraph 54,

and Case T-61/01 *Vendedurías de Armadores Reunidos* v *Commission* [2003] ECR II-327, paragraph 40). If any one of those conditions is not satisfied, the action must be dismissed in its entirety and it is unnecessary to consider the other conditions for non-contractual liability (see *Innova Privat Akademie* v *Commission*, paragraph 23, and the case-law cited).

85 The Commission contends, primarily, that since in its claims based on the actions *de in rem verso* and *negotiorum gestio* the applicant does not make any precise allegation that the conduct of the Commission was unlawful, those claims must be dismissed on the ground that the condition relating to the unlawfulness of the institution's conduct is not made out. As regards the applicant's argument that the failure to indemnify is itself the unlawful act, in the Commission's view that argument is circular in so far as the alleged damage and the act giving rise to liability are one and the same.

86 The Commission submits in the alternative that the conditions for founding an action based on the principle of the prohibition on unjust enrichment or *negotiorum gestio* are not met.

87 In particular it cannot be alleged that the Commission was enriched unjustly or without cause to the detriment of the applicant as a result of the suspension of the payments to Helmico and the issue of the recovery orders against it on account of fraud in the course of their contractual relationship. By acting in that manner, the Commission performed an obligation expressly provided for by the Financial Regulation which, contrary to the applicant's argument, did not give rise to a right in favour of the subcontractor. The Commission takes the view, on the contrary, that such an obligation ousts any possibility of considering the interests of any third parties.

88 The applicant is not justified in stating that it was 'unjustly' impoverished since the amount claimed for the work carried out pursuant to its contractual obligations corresponds to the amount owed to it by Helmico under the subcontracts. The Commission reiterates that the applicant chose not to enter into a contractual relationship with the Commission and cannot therefore claim the guarantees to which it would have been entitled as a contractual partner.

89 According to the Commission, the civil action based on *negotiorum gestio* is not intended to deal with a situation in which a subcontractor does work pursuant to a contract for the benefit of a third party. The Commission refers to the articles prepared in October 2003 by the Study Group on a European Civil Code concerning the Principles of European Law on Benevolent Intervention in Another's Affairs. Those articles exclude liability at the outset 'where the intervener is under a duty to a third party to act'. In this case, since the applicant was simply performing its obligations under its contract with Helmico, the *negotiorum gestio* type of liability is excluded without more.

90 According to those articles, liability based on *negotiorum gestio* would also be excluded because the 'intervener' must have a 'reasonable ground for acting'. However, 'the intervener does not have a reasonable ground for acting if the intervener has a reasonable opportunity to discover the principal's wishes but does not do so'. In the instant case, the Commission takes the view that, if the contract with Helmico no longer existed (which was not the case), it was perfectly feasible for the applicant to ascertain the Commission's wishes. If it did not do so, it acted 'unreasonably'; if it did do so and concluded that the Commission wished it to act in the way in which it did, that head of claim is subsumed under the claim for infringement of the principle of the protection of legitimate expectations.

Findings of the Court

91 It should be observed, first of all, that the rules on non-contractual liability, as provided for in the majority of national legal systems, do not necessarily contain a

condition relating to unlawfulness or fault with regard to the defendant's conduct. Actions based on unjust enrichment or *negotiorum gestio* are designed, in specific civil law circumstances, to constitute a source of non-contractual obligation on the part of persons in the position of the enriched party or the principal involving, in general, either refund of sums paid in error or indemnification of the manager respectively.

92 It does not therefore follow that those pleas regarding unjust enrichment and *negotiorum gestio* put forward by the applicant should be dismissed solely on the ground that the condition relating to the unlawfulness of the conduct of the institution is not satisfied, as submitted primarily by the Commission.

93 As set out in paragraphs 63 to 66 above, the second paragraph of Article 288 EC founds an obligation for the Community to make good any damage caused by its institutions, without restricting the rules governing the non-contractual liability of the Community solely to unlawful conduct on the part of those institutions. An act or conduct of an institution of the Community, although lawful, can in fact cause unusual and special damage which the Community is required to make good pursuant to the case-law cited above.

94 Further, the Community courts have already had the opportunity to apply certain principles in respect of recovery of undue payments, including in relation to unjust enrichment, the prohibition of which is a general principle of Community law (Case C-259/87 *Greece* v *Commission* [1990] ECR I-2845, summary publication, paragraph 26; Case T-171/99 *Corus UK* v *Commission* [2001] ECR II-2967, paragraph 55; and Joined Cases T-44/01, T-119/01 and T-126/01 *Vieira and Others* v *Commission* [2003] ECR II-1209, paragraph 86).

95 In order to determine whether those principles apply, it must therefore be examined whether the conditions governing the action *de in rem verso* or the action based on *negotiorum gestio* are satisfied in this case.

96 In that regard it is clear, as the Commission submits, that in the factual and legal context of this case actions based on unjust enrichment or *negotiorum gestio* cannot succeed.

97 According to the general principles common to the laws of the Member States, those actions cannot succeed where the justification for the advantage gained by the enriched party or the principal derives from a contract or legal obligation. Further, in accordance with those same principles, it is generally possible to plead such actions only in the alternative, that is to say where the injured party has no other action available to obtain what it is owed.

98 It is common ground in this case that there is a contractual relationship between the Commission and Helmico on the one hand, and between Helmico and the applicant on the other. The direct harm alleged corresponds to the payment owed to the applicant by Helmico under the subcontracts concluded between those two parties, which contain an arbitration clause in that respect, designating the courts of England and Wales as having jurisdiction over any contractual disputes. It is therefore unquestionably Helmico's responsibility to pay for the work carried out by the applicant and to incur any liability arising from non-payment, as is shown, moreover, by the legal proceedings brought by the applicant against Helmico to that effect before the High Court of Justice, which are currently pending but stayed. The possible insolvency of Helmico is no reason for the Commission to take on that liability, since the applicant cannot have two sources in respect of the same entitlement to payment. According to the documents in the file, and as is not disputed by the parties, those proceedings before the High Court of Justice relate to the payment of the services at issue in the present proceedings.

99 It follows that any enrichment of the Commission or impoverishment of the applicant, as it arose from the contractual framework in place, cannot be described as being without cause.

100 Similar reasoning may also be used to rule out the application of the principles of the *negotiorum gestio* civil action which, according to the general principles common to the laws of the Member States, lends itself only very exceptionally as a means to establish liability on the part of the public authorities in general, and more particularly in the factual and legal context of this action. The conditions governing the civil action based on *negotiorum gestio* are manifestly not satisfied for the following reasons.

101 Performance by the applicant of its contractual obligations with regard to Helmico cannot reasonably be described as benevolent intervention in another's affairs which it is imperative to manage, as required by the action in question. Before undertaking to continue the Russian project and the Moldova project, the applicant contacted the Commission's services in October 1998, which precludes its action from being benevolent in nature. Next, the conclusion which the applicant draws from the letter of 5 October 1998 that the Commission was not able to manage the projects in question appears to be wrong in the light of the content of that letter, in which the Commission expressly refers to the possibility that it would 'explore alternative means for safeguarding the completion of the project'. Finally, the applicant's argument is also in conflict with the principles of *negotiorum gestio* as regards the principal's awareness of the manager's action. The manager's action is generally carried out without the knowledge of the principal, or at least without the latter being aware of the need to act immediately. Yet the applicant itself submits that its choice to continue with the work in October 1998 was induced by the Commission.

102 In addition it is not without relevance that, according to case-law, it is the economic operators themselves who must bear the economic risks inherent in their operations, taking account of the circumstances of each case (see Case T-203/96

Embassy Limousines & Services v *Parliament* [1998] ECR II-4239, paragraph 75, and the case-law cited).

103 It has not been established that the applicant suffered unusual and special damage going beyond the limits of the economic and commercial risks inherent in its operations. In all contractual relationships there is a certain risk that a party will not perform the contract satisfactorily or will even become insolvent. It is for the contracting parties to mitigate that risk in a suitable manner in the contract itself. The applicant was not unaware that Helmico was not fulfilling its contractual obligations, but knowingly chose to continue to fulfil its own obligations rather than to take formal action. In so doing it ran a commercial risk which could be described as normal. Whether that choice was induced by the Commission and/or was in whole or in part motivated by the belief that the Commission would ensure that it was paid for its services if Helmico was not in a position to do so therefore falls within the scope of the plea relating to infringement of the principle of the protection of legitimate expectations.

104 It follows from the foregoing that the first two pleas, regarding the general principles common to the laws of the Member States on non-contractual liability in the absence of fault, must be dismissed as unfounded.

The claims based on the non-contractual liability of the Community for the unlawful conduct of its institutions

Legitimate expectations

— Arguments of the parties

105 The applicant refers to the case-law according to which the right to rely on the principle of the protection of legitimate expectations extends to any individual who

is in a situation in which it is apparent that the Community administration has led him to entertain certain justified expectations. It notes in addition that economic operators must bear the economic risks inherent in their operations, taking account of the circumstances of each case.

106 The applicant submits that the meeting with the Commission's services on 2 October 1998 and the subsequent correspondence relating to the setting-up of the special bank account of Helmico over which the applicant had power of attorney gave rise to an expectation on the part of the applicant that the Commission would ensure that the applicant was effectively paid for the work it had done.

107 According to the applicant, it was in reliance on that expectation that it completed the Moldova project and the Russian project. In so doing, it was not bearing a risk inherent it its operations because, not being the contracting party with the Commission, and not having been paid by Helmico, it was free to cease providing the services in question. Because it was dealing with the Commission it was reasonable for the applicant to expect that it would be treated fairly and that it was not running the risk of not being paid for the services provided at the insistence of the Commission's services.

108 By encouraging the applicant to complete the services and then by withholding payment to Helmico for those services and not taking steps to ensure that the applicant was indemnified for the work it had done, the Commission committed a fault that gives rise to non-contractual liability on its part.

109 The applicant submits that precise assurances, although not express, were apparent from the Commission's line of conduct as a whole in the present case, including the Commission's lack of reaction, summarised and interpreted as follows:

— the applicant drew the attention of the Commission's services to the fact that Helmico was not paying the applicant and was deceiving it by producing fabricated documentation concerning the invoices that Helmico had submitted to the Commission;

— the Commission's services considered this to constitute fraud because Community funds had been paid to Helmico and Helmico had not paid the provider of the services in question, namely the applicant;

— the applicant expressed to the Commission's services its intention not to commit further time and expenditure until some mechanism could be found of ensuring that it would be paid;

— the Commission's services were informed that such a mechanism had been established and did not raise any objection. More specifically, that was achieved by setting up the bank account of Helmico over which the applicant had power of attorney;

— a member of the Commission's services had expressed the concern that the Russian project might not be completed, and warned the applicant that the Commission might explore alternative means of completing the projects in question if the parties could not resolve their differences;

— the Commission's services allowed the applicant to continue working on the Russian project and the Moldova project and did not inform it until after completion of those projects that payments to Helmico would be suspended and recovery orders issued;

— the applicant did indeed complete the Russian project and the Moldova project and the completion reports were accepted by the Commission's services;

— the Commission made a payment to the bank account of Helmico over which the applicant had power of attorney;

— as appears from the Commission's letter of 22 March 2000, the Commission's services had been considering making additional payments to the applicant calculated on the basis of work done and expenditure incurred by it, but decided that there were legal uncertainties as to whether those payments could be challenged by Helmico or its trustees in bankruptcy;

— only once the applicant had completed the Russian project and the Moldova project and the project completion reports had been accepted did the Commission suspend all other payments and issue recovery orders against Helmico in April 2000;

— on 15 June 2000 the chairman of Masdar sent a fax to the member of the Commission in charge of External Relations in which he stated: '18 months ago we alerted the European Commission to the problems which we were having with our partners Helmico on the above two projects. We were given assurances

that if we continued with the projects the European Commission would ensure that we were paid for our services. We continued to fund and implement the two projects on your behalf at considerable incremental costs despite the fact that we already realised that Helmico had defrauded Masdar and that these funds would probably be irrecoverable';

— the reply of the member of the Commission by letter of 25 July 2000 does not contest the chairman of Masdar's statement that the applicant had been given assurances that it would be paid.

110 The Commission notes that it is settled case-law that economic operators must bear the economic risks inherent in their operations, taking account of the circumstances of each case. However, that rule is mitigated by the principle that legitimate expectations should be respected. According to settled case-law, the right to rely on the principle of the protection of legitimate expectations extends to any individual who is in a situation in which it is clear that the Community administration has, in particular by giving him precise assurances, led him to entertain justified expectations.

111 The Commission considers that the meeting with the Commission's services on 2 October 1998 and the subsequent correspondence relied on by the applicant cannot reasonably be interpreted as a 'precise assurance' from the Commission's services that they would ensure that the applicant would be effectively paid for the work which it did.

112 As regards the meeting in question, the Commission is of the opinion that it is incumbent on the applicant to prove that those assurances or, at least, statements

which could reasonably be interpreted as such, were in fact given at that meeting, which the applicant has not done. The Commission states that it is still prepared to settle the case amicably by payment of the sum of EUR 249 314.35, which represents the value of the services invoiced by the applicant after that meeting, provided that the latter is able to provide such proof.

113 As regards the fax of 5 October 1998 to Helmico, the Commission merely stated that it was concerned, on the one hand, that differences of opinion between Helmico and the applicant were likely to jeopardise the successful completion of the Russian contract, and, on the other hand, sought assurances that Helmico and the applicant would in fact comply with the terms of their respective contracts.

114 According to the Commission, the subsequent exchange of correspondence cannot be interpreted as such an assurance either. In fact, this consisted both of letters between the applicant and Helmico and letters addressed by Helmico to the Commission. The main tenor of those letters was an assurance that Helmico and the applicant had resolved their differences and that the Russian contract and the Moldova contract would be performed. They contained certain other information, in particular that the management of the projects at issue had been transferred to Masdar's chairman and that certain payments due under those contracts should henceforth be made to a named bank account of Masdar. That information merely related to the arrangements between those two parties, presumably agreed on in order to facilitate a solution to their differences of opinion, and it cannot be interpreted as a proposal to the Commission by those parties to vary the original contractual terms.

115 The Commission also denies that its absence of reaction in the letter of 25 July 2000 to the assertion made by Masdar in its letter of 15 June 2000 that it had been 'given assurances that if [it] continued with the projects the European Commission would ensure that [it would be] paid for [its] services' may be taken as an express guarantee or a tacit agreement that Masdar had entered into contractual relations with the

Commission, or that the Commission had undertaken to ensure that the applicant would be paid for all the work which it had performed under its contract with Helmico (Case T-123/89 *Chomel* v *Commission* [1990] ECR II-131, paragraph 27).

116 The Commission further points out that, in order to rely on the principle of the protection of legitimate expectations, the applicant must show a causal link between the assurances given and the damage suffered. In other words, it must not only show that assurances have been given by the Community institution concerned but also that it has suffered damage by acting in reliance on those assurances (*Embassy Limousines & Services* v *Parliament*).

117 Accordingly, even if the letter of 25 July 2000 did contain an assurance that the applicant would be paid, that assurance would be inoperative, since any damage suffered by the applicant in incurring expenditure on performing its contract with Helmico would have occurred before that date.

118 The Commission concludes that no precise assurances were given to the applicant and that the claim based on legitimate expectations should be dismissed.

— Findings of the Court

119 According to settled case-law, the right to rely on the principle of the protection of legitimate expectations, which is one of the fundamental principles of the Community, extends to any individual who is in a situation in which it is clear that the Community administration has, by giving him precise assurances, led him to entertain justified expectations. Irrespective of the manner in which it was

communicated, precise, unconditional and consistent information coming from authorised and reliable sources amount to such assurances (see Joined Cases T-66/96 and T-221/97 *Mellett* v *Court of Justice* [1998] ECR-SC I-A-449 and II-1305, paragraphs 104 and 107, and the case-law cited). It is also established in the case-law that the principle of the protection of legitimate expectations constitutes a rule of law conferring rights on individuals (Case T-43/98 *Emesa Sugar* v *Council* [2001] ECR II-3519, paragraph 64). The Community may thus incur liability for infringement of that principle. Nevertheless economic operators must bear the economic risks inherent in their operations having regard to the circumstances specific to each case (see, to that effect, Joined Cases 83/76 and 94/76, 4/77, 15/77 and 40/77 *HNL and Others* v *Council and Commission* [1978] ECR 1209, paragraph 7, and Case 267/82 *Développement and Clemessy* v *Commission* [1986] ECR 1907, paragraph 33).

120 According to the case-file, the expectations cited by the applicant relate to the payment by the Commission for services provided under contract to Helmico. It is clear in this case that the written documents emanating from the Commission before the Court cannot in any way be interpreted as precise assurances that the Commission undertook to pay for the applicant's services which could give rise to justified expectations on its part.

121 The fax of 5 October 1998 was addressed to Helmico and in addition contained a warning that if completion of the Russian project appeared to be in jeopardy, the Commission could, in order to complete it, explore means other than the services of the consortium consisting of Helmico and the applicant. That letter cannot therefore be construed as 'insistence' on the part of the Commission that the applicant complete the Russian project at all costs or as an assurance that, should the applicant not be paid by Helmico, the Commission would assume responsibility for such payment.

122 The Court also takes the view that the correspondence relating to the opening of the special bank account of Helmico over which the applicant had power of attorney

also cannot be interpreted as an assurance given to the applicant since the Commission was not taking a decision in the context of that correspondence, which consisted of letters between the applicant and Helmico and letters sent by Helmico to the Commission. Certain information relating to the financial arrangements between those parties was brought to the Commission's attention by those letters. The fact that the Commission took note of the change of Helmico's bank account, although it was aware of the applicant's power of attorney over that account, cannot nevertheless be interpreted as some additional assurance given by the latter.

123 No such assurance may be inferred from the letter of 29 July 1999 sent to the applicant by the Commission. That letter informed the applicant of the Commission's decision to make only an interim payment of EUR 200 000 which would be paid into Helmico's account on the basis of the invoices issued by it, and to suspend future payments until the question of the financial irregularities in the Moldova project and the Russian project had been clarified. That letter thus clearly indicated that future payments would not be made by reference to work done by the applicant but by reference to invoices issued by Helmico, and that they would still be conditional on the results of the audits on the use of Community funds.

124 Next, as regards the letter sent to the applicant by the Commission on 22 March 2000, to read that letter as containing assurances of payment is inconsistent with the actual content of that letter, by which the Commission expressly refuses the applicant's request to be paid directly by the Commission, in particular on account of the legal consequences in the event of the insolvency of Helmico, in the light of the contractual relationship between the latter and Masdar.

125 Finally, as regards the letter of 25 July 2000, as the Commission correctly observes, its absence of reaction to the assertion, made for the first time by the applicant, that

it had given assurances cannot be deemed to constitute confirmation of that assertion; nor can the letter in itself be considered to be a precise assurance given by the Commission.

126 There is also no evidence before the Court to prove that those assurances were given at the meeting of 2 October 1998.

127 Furthermore, having regard to the other material in the file, that appears highly unlikely. Precise assurances to pay the applicant directly would have meant a fortiori a change in the original contractual terms. In those circumstances, since the original contractual framework was in writing, an amendment to that framework would normally also have to have been in writing. Yet the express request for confirmation of acceptance of the amendments, sent to the Commission by fax of 6 October 1998 and signed jointly by Helmico and the applicant remained unanswered. It may be inferred from that that the Commission's true intention was not to alter the rights and obligations in force. The Commission's position, as shown by those documents and facts, seems consistent in that it always avoided becoming involved directly with the applicant and tried to remain in the contractual relationship with Helmico as regards both the correspondence and the payments subsequent to the meeting of 2 October 1998.

128 According to the Commission's reply to the Court's written questions, no minutes were kept of that meeting, which makes it informal in nature. In such circumstances, the Court considers that it could not reasonably be accepted that the Commission could commit itself to such large sums of money at a meeting of that kind, particularly because no subsequent action was taken that could confirm, if necessary, that such a commitment was given. Finally, even were it to be accepted that a Commission official gave verbal assurances on the question of payment at an

informal meeting, it would not in any event be reasonable for a circumspect and reasonable trader to take on costly works on the basis of such assurances without other supporting guarantees.

129 Finally, so far as concerns the offer made by the Commission to the applicant in its fax of 15 May 2003 of an amicable settlement in the sum of EUR 249 314.35 for the work done after the discovery of Helmico's fraud, it is clear from that fax that the offer was conditional on proof of an agreement between the Commission and the applicant that the applicant would be paid directly by the Commission if it completed the Russian project and the Moldova project. However, the applicant has not been able to adduce such evidence either before the Commission or the Court, but has only been able to put forward mere assertions which do not appear to have probative value in the light of the other material in the file.

130 In those circumstances, it must be concluded that the evidence available, examined separately or as a whole, does not reveal precise assurances given by the Commission which could give rise to reasonable expectations on the part of the applicant, enabling it to rely on the principle of the protection of legitimate expectations.

131 The third plea, regarding infringement of the principle of the protection of legitimate expectations, must therefore be dismissed as unfounded.

Fault or negligence

— Arguments of the parties

132 In the applicant's view, it follows from general principles of non-contractual liability for fault under civil law systems and the principle of tortious liability for negligence

under Anglo-Saxon systems that, where the Commission exercises its power to suspend payment on a contract in cases of error, irregularity or fraud on the part of the other contracting party, it must exercise reasonable care to ensure that it does not cause harm to third parties or, if necessary, indemnify the third parties for such loss.

133 In the present case the Commission's services ought reasonably to have been aware of the fact that suspension of payment to Helmico would result in the applicant's not being paid for services which it had provided in good faith to the Commission as the subcontractor of Helmico. It cannot be said that the applicant's loss is no more than the normal commercial risk of non-payment by a debtor. This case does not involve a risk of that nature materialising, but rather the conscious use by the Commission of powers which are not available to ordinary private-law commercial operators; it is for that reason that the Commission ought to have exercised the special powers granted to it under the Financial Regulation in such a way as to avoid or mitigate the loss it knew it would cause to third parties.

134 The Commission could have paid Helmico by transfer to a special account over which the applicant had power or attorney, as it did when it made the payment of EUR 200 000 in September 1999. In this way the Commission could have discharged its contractual obligation to Helmico and also its non-contractual obligation to avoid causing harm to the applicant. In those circumstances, any claim by a trustee in bankruptcy of Helmico for recovery of creditors' funds would lie against the applicant, not against the Commission, because the funds would have been taken from Helmico's account by the applicant.

135 For those reasons, the applicant submits that the Commission is required to compensate the applicant for the loss caused by its decision to suspend payments to Helmico.

136 The Commission does not accept the applicant's contention. It takes the view, first, that when deciding whether to suspend payments, to refuse to make payment or to recover amounts already paid under a contract, it is not under a duty of care vis-à-vis third parties. Secondly, it is of the opinion that even if it were under such a duty, it exercised reasonable care in the circumstances of the present case. Thirdly, it submits that the applicant has not demonstrated a causal link between the alleged fault and the damage which it claims to have suffered.

137 According to the Commission, when it decides to suspend payments or recover debts, it has certain obligations, as a custodian of public money, which are not incumbent on private law economic operators. The Commission is already subject to a discipline which is not imposed on economic operators. There is no reason to cast upon it an additional duty to have regard to the financial interests of third parties such as sub-contractors when it considers whether to exercise its powers under the Financial Regulation.

138 Even if the Commission were to be held to be under a duty to take into account the applicant's interests when considering whether to suspend payments to Helmico — which is not the case — the Commission submits that it has in any event acted reasonably. The auditor's report indicated that serious fraud had been committed by Helmico. That fraud, which related to the billing of work which had never taken place, was serious and had a direct impact on the amounts which Helmico was entitled to claim under the contract. The Commission's decision cannot therefore be regarded as unreasonable.

139 As regards the causal link, the Commission notes that if it had paid the remainder of the money allegedly due to Helmico, it is by no means certain that that money would have been transferred to the applicant. Had it paid the sums allegedly due directly to the applicant, in the absence of a contractual obligation to do so it would have run the risk of having acknowledged that it was a debtor of Helmico and of having given

collusive preference to a particular creditor, namely the applicant. It would thus have risked having to pay the same debt twice if the liquidator decided to pursue Helmico's claims against its debtors.

— Findings of the Court

140 It is clear from the applicant's pleadings that the conduct of the Commission complained of is the suspension of payments to Helmico. The Commission's conduct is unlawful, according to the applicant, because it did not exercise reasonable care to ensure that that suspension did not cause harm to third parties and, if necessary, to indemnify those third parties for the damage thereby suffered.

141 The Court notes, first of all, that the applicant merely states that such a duty of care exists, without adducing the slightest proof or putting forward legal arguments in support of its claim or specifying the origin and scope of that duty. The Court takes the view that a very vague reference to the general principles of non-contractual liability for fault under civil law systems and the principle of tortious liability for negligence under Anglo-Saxon systems does not show that the Commission is under an obligation to have regard to the interests of third parties when it makes a decision regarding the suspension of payments in the course of its contractual relationships. The same applies to the alleged obligation on the Commission to transfer money into an account over which the applicant had power of attorney. The Court also considers, like the Commission, that the applicant has not shown that there is a causal link between breach of the alleged obligation and the damage pleaded. In the light of the foregoing, the Court holds that the fourth plea must be rejected as unfounded.

142 It follows from the above that the applicant's third and fourth pleas, based on the rules of tortious liability, must be rejected.

Evidence offered in support

143 By a separate document lodged at the Registry of the Court of First Instance on 20 December 2004, the applicant made an application under Article 68(1) of the Rules of Procedure for an order that Mr W, a director of the applicant, be summoned to give oral evidence of the content of the meeting that took place on 2 October 1998 between the applicant and the Commission's services.

144 In its observations on the application for a witness to be heard, lodged at the Registry of the Court of First Instance on 3 February 2005, the Commission does not object to Mr W being heard provided that Mr K and Ms H, who represented the Commission in that meeting, are also heard.

145 Article 68(1) of the Rules of Procedure provides that the Court of First Instance may, either on application by a party or of its own motion, order that certain facts be proved by witnesses. The need for such a measure of enquiry should be evaluated in the light of the facts relevant to the result of the case and depends on whether the Court is able to determine the matter properly on the basis of the forms of order sought, pleas in law and arguments presented during the written and oral procedure and in the light of the documents produced (see to that effect Case T-146/00 *Ruf and Stier* v *OHIM (DAKOTA image)* [2001] ECR II-1797, paragraph 65).

146 The applicant gives the absence of written evidence of the content of that meeting as the reason for its application. According to the applicant, Mr W's evidence would serve to elucidate the factual issues relating, first, to the applicant's intentions with regard to continuing to work on the projects in progress and, second, to the Commission official's reactions to the prospect of work ceasing following that meeting.

147 The applicant gives an indication of what the content of any testimony of Mr W would be. That evidence would establish that 'the Commission's services were anxious to see the Russian project completed and Mr W was prepared for the applicant to continue working on the contract if it could expect to be paid for work undertaken and expenses incurred'.

148 The subsequent facts support the information which would be obtained as a result of such a testimony, and the Commission does not challenge such an interpretation of the facts, which gives it probative value. But, unfortunate as it may be, even if the content of such a testimony were to be accepted as a proven fact, that would show at the very most that the applicant and the Commission had a common intention that the applicant complete the Russian project and the Moldova project and be paid for its work despite Helmico's problems. Moreover, in the light of the other material in the file, there is no doubt that there was such an intention between those two parties. That does not suffice, however, to prove the existence of precise, unconditional and consistent information that the Commission undertook to pay the applicant directly from that date.

149 It follows from the foregoing that the result of the case cannot in any event depend on that sole testimony and that the Court is able to determine the matter properly on the basis of the forms of order sought, pleas in law and arguments presented during the written and oral procedure and in the light of the documents produced. The applicant's application for a witness to be heard is therefore dismissed.

150 It follows from all of the foregoing considerations that the alleged damage is not attributable to a Community institution or body. In those circumstances, the action must be dismissed in its entirety as unfounded. It is unnecessary to consider whether the other conditions governing the non-contractual liability of the Community are satisfied in this case.

Costs

151 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

152 Since the applicant has been unsuccessful and the Commission has asked for costs to be awarded against it, it must be ordered to pay the Commission's costs, as well as bearing its own.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the action;

2. Orders the applicant to pay the costs.

Vilaras Martins Ribeiro Jürimäe

Delivered in open court in Luxembourg on 16 November 2006.

E. Coulon M. Vilaras

Registrar President